

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 21-1537V

UNPUBLISHED

MARIANNE FREDERICKS GRANT, as
Executor of the Estate of EILEEN
ARCERY, *Deceased*

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: May 10, 2023

Special Processing Unit (SPU); Joint
Stipulation on Damages; Influenza
(Flu) Vaccine; Shoulder Injury
Related to Vaccine Administration
(SIRVA)

*Bruce William Slane, Law Office of Bruce W. Slane, P.C., White Plains, NY, for
Petitioner.*

*Benjamin Patrick Warder, U.S. Department of Justice, Washington, DC, for
Respondent.*

DECISION AWARDING DAMAGES¹

On July 1, 2021, Eileen Arcery filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² (the “Vaccine Act”). Ms. Archery alleged that she suffered a Shoulder Injury Related to Vaccine Administration (“SIRVA”) as a result of her influenza (“flu”) vaccination on September 26, 2020. Petition at 1. The case was assigned to the Special Processing Unit of the Office of Special Masters.

¹ Because this Decision contains a reasoned explanation for the action taken in this case, it must be made publicly accessible and will be posted on the United States Court of Federal Claims' website, and/or at <https://www.govinfo.gov/app/collection/uscourts/national/cofc>, in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2018) (Federal Management and Promotion of Electronic Government Services). This means the Decision will be available to anyone with access to the internet. In accordance with Vaccine Rule 18(b), Petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all section references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2018).

On January 25, 2023, a ruling on entitlement was issued, finding Petitioner entitled to compensation for SIRVA.³ On May 5, 2023, Respondent filed a proffer on award of compensation ("Proffer") indicating Petitioner should be awarded \$47,500.00 in pain and suffering. Proffer at 2-3. In the Proffer, Respondent represented that Petitioner agrees with the proffered award. *Id.* Based on the record as a whole, I find that Petitioner is entitled to an award as stated in the Proffer.

Pursuant to the terms stated in the attached Proffer, **I award Petitioner a lump sum payment of \$47,500.00 (representing pain and suffering) in the form of a check payable to Petitioner.** This amount represents compensation for all damages that would be available under Section 15(a).

The Clerk of Court is directed to enter judgment in accordance with this decision.⁴

IT IS SO ORDERED.

s/Brian H. Corcoran

Brian H. Corcoran
Chief Special Master

³ Ms. Arcery died on November 20, 2022, and Marianne Fredericks Grant was appointed as the executor of Ms. Arcery's Estate and substituted as Petitioner herein. ECF Nos. 39, 41-42.

⁴ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by the parties' joint filing of notice renouncing the right to seek review.

On July 1, 2021, Eileen Arcery (“Ms. Arcery”) filed a petition for compensation (ECF No. 1) under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34, as amended (“Vaccine Act”). Ms. Arcery alleged that she suffered a Shoulder Injury Related to Vaccine Administration (“SIRVA”) as a result of her receipt of an influenza (“flu”) vaccination on September 26, 2020. ECF No. 1 at 1. On October 24, 2022, the Secretary of Health and Human Services (“respondent”) filed a motion to dismiss and Rule 4(c) report (ECF No. 24), in which he argued that Ms. Arcery had failed to establish a claim for compensation under the Vaccine Act, and because of that, the case should be dismissed. After respondent filed his motion to dismiss and Rule 4(c) report, Ms. Arcery filed additional evidence pertaining to treatment that she received for her SIRVA. *See* Petitioner’s Exhibits (“Exs.”) 9, 10. Ms. Arcery filed a response to respondent’s motion to dismiss on November 7, 2022 (ECF No. 28).

After reviewing the additional evidence that Ms. Arcery filed, respondent filed a combined status report and reply to Ms. Arcery's response to his motion to dismiss (ECF No. 34)

on December 5, 2022, in which he stated that he wished to file an amended Rule 4(c) report in order to revise his position in this case. On January 19, 2023, respondent filed an amended Rule 4(c) report (ECF No. 35) indicating that this case was appropriate for compensation under the terms of the Vaccine Act for a SIRVA Table injury. On January 25, 2023, the Chief Special Master issued a Ruling on Entitlement (ECF No. 36), finding that Ms. Arcery was entitled to compensation.

Ms. Arcery died of cancer on November 20, 2022. On February 13, 2023, petitioner's counsel filed documentation establishing that on January 10, 2023, Marianne Fredericks Grant was appointed as the executor of Ms. Arcery's Estate under the laws of the State of New York. *See* Ex. 11. All references to petitioner herein refer solely to Marianne Fredericks Grant in her representative capacity as the executor of the Estate of Eileen Arcery.

I. Item of Compensation

A. Pain and Suffering

Respondent proffers that petitioner should be awarded \$47,500.00 in pain and suffering. *See* 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

This amount represents all elements of compensation to which petitioner is entitled under 42 U.S.C. § 300aa-15(a). Petitioner agrees.

II. Form of the Award

Petitioner is a competent adult. Respondent recommends that the compensation provided to petitioner should be made through a lump sum payment as described below and requests that

the Chief Special Master's decision and the Court's judgment award the following:¹ a lump sum payment of \$47,500.00, in the form of a check payable to petitioner.

III. Summary of Recommended Payment Following Judgment

Lump sum payable to petitioner, Marianne Fredericks Grant, as Executor of the Estate of Eileen Arcery: **\$47,500.00**

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

C. SALVATORE D'ALESSIO
Director
Torts Branch, Civil Division

HEATHER L. PEARLMAN
Deputy Director
Torts Branch, Civil Division

TRACI R. PATTON
Assistant Director
Torts Branch, Civil Division

/s/ Benjamin P. Warder
BENJAMIN P. WARDER
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146, Ben Franklin Station
Washington, DC 20044-0146
Telephone: (202) 532-5464
Email: Benjamin.P.Warder@usdoj.gov

DATE: May 5, 2023

¹ If for some reason petitioner is not authorized by a court of competent jurisdiction to serve as the executor of the Estate of Eileen Arcery at the time a payment pursuant to this Proffer is to be made, then any such payment shall be paid to the party or parties appointed by a court of competent jurisdiction to serve as executor of the Estate of Eileen Arcery upon submission of written documentation of such appointment to respondent.